

## P R O C E E D I N G S

2 May 2nd, 1997

3 3:30 p.m.  
- - -4 (The following proceedings were reported by  
5 Allison Pauline:)

6 THE COURT: Recall the jury.

7 MR. WILNER: The hook comes out 25 minutes  
8 from now.

9 THE COURT: Okay.

10 MR. MOTLEY: You told me I had 50.

11 THE COURT: I was -- never mind. You have  
12 a person who is going to operate the hook  
13 already aware?14 MR. WILNER: They are dying to operate the  
15 hook.16 MR. MOTLEY: And I hope it's not a  
17 one-armed hooker either.18 THE COURT: Okay. That was the word I was  
19 trying to avoid, Mr. Motley.

20 THE COURT: You may proceed, sir.

21 MR. WILNER: May it please the Court?  
22 Hello again, this will be brief, but I'm dying  
23 to talk to you, but I'll restrain myself for the  
24 next 25 minutes and then we'll be done.25 This defendant has a very unusual position,  
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1 and that is that everybody knows but it doesn't  
2 agree, it sells candy with razor blades inside  
3 to anyone who wants to buy it, and then  
4 blames -- suggests that those people shouldn't  
5 have bought that candy. Just shouldn't have  
6 bought it. And for the next 25 minutes I hope  
7 to explain why that's the wrong thing to do.

8 He first thing I heard about was that  
9 Reynolds really didn't need to place a warning  
10 on its products even though they knew that they  
11 were lethal in the time period from 1941 up  
12 until 1969 because everybody knew. And this was  
13 talked about so much in this trial that I tried  
14 to make a list of the things that supposedly --  
15 I wondered whether everyone knew. I wonder in  
16 1950 or '53 or 1961 did everyone know that  
17 addiction to nicotine is physiological, that  
18 actually it effects your brain and probably  
19 irreversibly. Dr. Feingold didn't know it.  
20 That's for sure.

21 In fact, it's interesting that much of this  
22 knowledge came out fairly recently. Did the  
23 public know that death awaits 40 to 50 percent  
24 of regular users of cigarettes in 1961?  
25 Certainly that information was available to  
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1 Reynolds.

2 Did the public know that the product was  
3 loaded with carcinogens which caused  
4 irreversible genetic damage? Did they know that  
5 too? Certainly Reynolds knew that.

6 Did the public all know that cancer of the  
7 esophagus, cancer of the pancreas, cancer of the  
8 larynx and cancer of the lung awaited the

9 foreseeable users who used it just like it was  
10 expected and intended? Reynolds knew that. Did  
11 they know that heart disease awaited the  
12 excepted users? Reynolds knew all that.

13 To say that they are removed from the  
14 obligation of warning because they believe  
15 everyone knows is like saying there is no need  
16 to label a poison, because people know that  
17 poison in general is dangerous. But do they  
18 know about Salems and do they know how dangerous  
19 and do they know -- the kind of knowledge that  
20 Reynolds has?

21 Now, this is the instruction, the full  
22 instruction that you'll be given. It says the  
23 manufacturer has a duty to exercise reasonable  
24 diligence in warning of reasonable -- reasonably  
25 foreseeable dangers associated with the use of

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1 its product and we agree.

2 A manufacturer has a duty to warn when the  
3 hazards associated with a product are not  
4 obvious. Should we say that all of the hazards,  
5 the critical hazards of cigarettes are obvious  
6 from the package? How would one know? We would  
7 have to be cancer researchers to know that.

8 Are not obvious, reasonably apparent, same  
9 thing, and here is the key, are not as well-known  
10 to the user as to the manufacturer. Who knew  
11 more? Was it Reynolds or was it the public at  
12 large? A manufacturer, however, does not have a  
13 duty to warn of risks associated with this  
14 product when those risks are reasonably known to  
15 the average consumer with knowledge common to  
16 the community.

17 And, again, are we to say that Reynolds  
18 gets off the hook because those risks are known  
19 to the community in sufficient detail to protect  
20 the customer or did Reynolds have knowledge and  
21 did the scientific -- coming both from inside  
22 and outside the scientific community that would  
23 have required Reynolds to be serious about  
24 warning and not to be serious about hiding the  
25 ball?

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1 In the suggestion that the public somehow  
2 knows everything about cigarettes that Reynolds  
3 denies, we have heard that the public knows that  
4 it may be hazardous, that the public has heard  
5 or seen allegations, that the public has better  
6 knowledge of this than some other problem, I  
7 don't know that that proves. The fact that  
8 cigarettes are big news means that a lot of  
9 people are involved in this and there has been a  
10 lot of disease. It's true this is a big issue,  
11 but it doesn't have anything to do with the  
12 amount of knowledge that's required before you  
13 can just sign off as a manufacturer and say  
14 forget it.

15 What that provision in the law is meant to  
16 accomplish is to prevent the requirement for  
17 warnings on truly obvious things like knives may

18 be sharp. It is true that if it's obvious from  
19 the nature of it water is wet, you can fall down  
20 off a roof and knives are sharp, that the law  
21 does not require we go around warning about  
22 things that are truly obvious.

23 But for the cigarette industry to sit back  
24 there and Reynolds in particular with specific  
25 knowledge about the lethality of its products to

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1 promote them in such a way that they seem very  
2 attractive, to put razor blades in the candy and  
3 then back away from it and say, well, everybody  
4 knew generally about the risks, so we really  
5 didn't have to do anything. That is not the  
6 intent of that particular law and it shouldn't  
7 be your intent to follow that.

8 We learned also --

9 MR. CRIST: I'd object to the statement.  
10 Expressions of the intent of the law, I think  
11 the instructions ought to come from the court.

12 THE COURT: The intent of the law is not a  
13 matter of concern for the jury. The law will be  
14 as I will instruct you at the conclusion of  
15 arguments and prior to your deliberations.

16 MR. WILNER: The -- we also heard that  
17 the -- there were certain agencies like the  
18 AMA's various doctors who pitched in at times  
19 and said we don't think a warning is necessary  
20 at different times. It was unclear in Mr.  
21 Crist's explanation whether they were saying a  
22 warning wasn't necessary because they thought  
23 everyone knew, which is the AMA in 1964, and  
24 I'll discuss that in a minute, or whether they  
25 were saying they just didn't disagree, they were

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1 doubters. They hadn't been convinced yet.

2 When this whole subject was covered about  
3 with Dr. Feingold we talked about there were  
4 doubtters. A lot of them worked very closely  
5 with the cigarette industry. We have proven  
6 that. The AMA on the eve of making that  
7 statement this -- this -- what I characterize as  
8 an absurd statement, to say that no one would be  
9 benefitted, even young people, by a proper  
10 warning, something that congress rejected, of  
11 course, two years later, and passed a warning  
12 even though in '66, it was much too weak, but  
13 the AMA on the eve of that received its \$10  
14 billion grant from the cigarette industry, a  
15 little too close to call.

16 The question is -- is suggested that a  
17 warning would not have made a difference, and  
18 for R.J. Reynolds to suggest having chosen not  
19 to put a warning on for purposes of sales of its  
20 product to come back now and say, well, we don't  
21 think the warning would have made a difference  
22 consider the credibility of that. Evidently  
23 they thought that the warning would have made a  
24 difference in sales. And if it would have made  
25 a difference in sales it means some people might

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1 have seen an adequate warning and not bought.

2 Certainly it wasn't the problem with  
 3 printing it up. I mean, we know that they had  
 4 the money to print it and put it on the  
 5 package. What would be the down side? Why  
 6 would they care? If it's true that everybody  
 7 knows, why wouldn't they say, well, just out of  
 8 caution we'll just go ahead and put a nice big  
 9 red warning, a nice skull and cross bones on  
 10 there, since if everybody knows already it won't  
 11 effect our sales, but we know that's not true.

12 It's exactly that effect that they didn't  
 13 want to have. And there comes a time when the  
 14 birds come home to roost and this is that time.  
 15 All those decisions that were made for their  
 16 profits over the years to withhold this  
 17 information have built up in Jean Connor,  
 18 through Jean Connor they are coming back.

19 Now, let me talk a little bit about since  
 20 they discussed whether putting a warning would  
 21 have made a difference. It's true depending on  
 22 the strength of your addiction or your  
 23 dependence information may or may not be  
 24 valuable. It's always valuable, but it may or  
 25 may not be enough. It takes health, it takes

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1 luck, it may take friends, it may take a  
 2 physician. Jean Connor got an intervention.  
 3 She did. She got a physician telling her,  
 4 listen, this is serious stuff. Stop.

5 It was really the first time that that  
 6 serious intervention happened in her life and  
 7 the sad thing about it is it came too late. It  
 8 came too late to save her. If she hadn't been  
 9 fatally ill at that time, would she have  
 10 succeeded in terminating smoking for good?  
 11 We'll never know. She remained on the patch  
 12 until almost the day she died.

13 We'll never know whether she would have  
 14 been a relapse or whether she would have  
 15 succeeded. She got the wake up call but  
 16 unfortunately for her the damage had been done.  
 17 Can we hold that against her? I think not. Mr.  
 18 Crist says, look, nicotine addiction doesn't  
 19 destroy families. It doesn't? I think it  
 20 does.

21 Mr. Crist seeks to trivialize addiction to  
 22 suggest that addiction is like -- addiction to  
 23 nicotine can be considered to be addiction to  
 24 sports or addiction to -- even to caffeine or to  
 25 Coca Cola. I would suggest that if Coca Cola

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1 were killing people at the rate of 40 percent of  
 2 regular users who were dying from some horrible  
 3 cancer from Coca Cola that we could take very  
 4 seriously the issue of whether caffeine was  
 5 truthfully addictive. But right now it doesn't  
 6 seem to be a big problem. There are no diseases  
 7 associated with caffeine. It appears to be self  
 8 regulating. It may have an effect on the brain

9 and it may not, but it just isn't a medical  
10 issue. The same with jogging and so forth.  
11 Those kinds of things are not considered  
12 addictions as Dr. Feingold discussed. They are  
13 not exogenous drugs and they don't lead to a  
14 maladaptive use pattern, but nicotine does, not  
15 that it makes you crazy, it doesn't make you  
16 crazy. It kills you because of the thing that  
17 comes with it, which is the bad stuff, the razor  
18 blade in the candy, the carcinogens in the  
19 smoke. That is what does it with nicotine.

20 If it were just pure nicotine it would  
21 probably be okay. It's not exactly like alcohol  
22 and cocaine, we agree, but it's not pure  
23 nicotine and that's the defect in the cigarette,  
24 enough nicotine to keep you addicted and enough  
25 carcinogens to kill you dead, and that kind of

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1 product should not be in its present state or in  
2 its state in 1966.

3 What kind of product was it? This is in  
4 evidence as a Reader's Digest article called,  
5 The Search for Safer Cigarettes, November 1959,  
6 and it gives a ranking of all of the cigarettes  
7 and this is tar. And look who is on top. Salem  
8 has the highest tar of all the cigarettes. It  
9 has a higher tar, and these are the filters at  
10 25, it has a higher tar of many of the  
11 unfiltered, and that tar was never marked on the  
12 box.

13 So did the consumer know what they were  
14 buying with Salem? Did they know that they were  
15 buying the worst of the worst? Did they know  
16 when they bought the filter -- were they  
17 thinking they were getting some benefit when it  
18 was really worse than a lot of the nonfilters?  
19 How could this be? Look at the nicotine, deadly  
20 nicotine, addictive nicotine, nicotine that also  
21 causes cancer directly. Look at the deadly  
22 nicotine in Salem King, the highest of the --  
23 the highest of the filters.

24 Again, where would a consumer get this  
25 information? This is 1959. Jean Connor started  
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1 smoking these things in 19- -- in the early  
2 1960s, where would she get the information? How  
3 would she know? If she were lucky she could  
4 read Reader's Digest but there is no law saying  
5 you have to do that. It happened to be  
6 published here, good thing.

7 Why would the R.J. Reynolds Tobacco Company  
8 conceal that information? One reason, I guess,  
9 they don't want you to think about the stuff.  
10 They want you to think about this. This -- this  
11 is what they want you to think about, not that  
12 nasty old nicotine, not that. They don't want  
13 you to think about death. They want you to  
14 think fantasy world, and that's the razor blade  
15 inside that package of candy.

16 Now, Dr. Feingold made an appearance, it  
17 was very nice to see him again, and the purpose

18 of this was to show that he was all wrong, that  
19 he changed his mind. Well, he did. Dr.  
20 Feingold in -- like many other people was  
21 unaware until fairly recently of the -- how much  
22 impact this nicotine has on the brain, the  
23 physiological side of the impact. And when I  
24 went back and I said aren't you kind of  
25 surprised that you held that belief in '92? And

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1 he says, yeah, I tell you what, I don't  
2 remember -- I didn't remember how late it was.  
3 I read 1988 Benowitz, 1994 the Benowitz article  
4 on the Threshold of Nicotine Addiction. I read  
5 the Teague documents which were incredible and I  
6 read the 1996 FDA report and, yeah, I see what's  
7 going on now. And he does. And a lot of people  
8 do, except these guys. They don't get it. They  
9 want to hold on to the 1964 definition. It's  
10 not intoxicating so just let's forget about the  
11 effect on the brain.

12 Well, as soon as this internal stuff got  
13 out, as soon as the Teague memorandum, the other  
14 research in California and the FDA research got  
15 out, it's become very, very clear what's going  
16 on to everyone but the -- R.J. Reynolds.

17 MR. MAXWELL: 10 minutes left.

18 MR. WILNER: 10 minutes left. Thank you.  
19 All right. Let me handle this other issue. On  
20 the verdict form -- where is the verdict form?  
21 Does anybody have it? I'll get it in just a  
22 moment.

23 On the verdict form -- we'll return to  
24 this. Was there negligence on the part of the  
25 defendant R.J. Reynolds Tobacco Company? We

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1 suggest you say yes. Were the cigarettes  
2 manufactured by R.J. Reynolds unreasonably  
3 dangerous and defective in the legal cause? We  
4 suggest you say yes. If your answer was no skip  
5 it. If your answer is yes, go on.

6 Did the decedent know or should she have  
7 reasonably known of her claimed injuries on or  
8 before March 29th, 1991? The answer is no.  
9 Now, why do I say that? Well, I want to say  
10 more than just no. I want to say that you  
11 can -- you can tell -- what is the expression?  
12 A chain is only as strong as its weakest link.  
13 I want to suggest to you that you can evaluate  
14 the credibility of the whole shooting match over  
15 here by perhaps something that we can all look  
16 at it and it doesn't refer to anything else  
17 outside this case, it doesn't take any other  
18 knowledge, but it's incredible, and if it's  
19 incredible here it suggests that a lot of the  
20 arguments being made are, in fact, incredible.

21 MR. CRIST: Your Honor, I object to the  
22 challenge of credibility.

23 THE COURT: I'm not sure I followed the  
24 argument.

25 MR. WILNER: Well, Your Honor, I'm through  
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1 with it. I'm just going to present the argument  
2 on this -- on this -- on the verdict number  
3 three.

4 The argument was made that Jean Connor  
5 should have known enough to file a cigarette  
6 related illness claim before 1991 and this thing  
7 is from 1982. So what does it say exactly? It  
8 says -- this is some physical examination, who  
9 knows, somewhat emphysematous changes, that's  
10 it. There is no diagnosis of any disease.  
11 There is no lung cancer diagnosis. If she had  
12 gone into court with that, how long would that  
13 suit have lasted? Your diagnosis is -- some  
14 doctor said some what emphysematous changes and  
15 that's it? That's not anywhere near what it  
16 takes to file a lawsuit and have a diagnosis,  
17 and this is even worse. This is some nurse's  
18 note that says SOB-smoking and we don't even  
19 know who wrote it. That would not be enough.

20 Anyone who has momentary or whatever,  
21 shortness of breath, and someone else says it's  
22 due to smoking, lawsuits have to be on sterner  
23 stuff than that. That's kind of neither here  
24 nor there, so to speak. Where is the diagnosis  
25 that caused -- that led to her death? Here it

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1 says right here, this is 6/22/93, after '91,  
2 this is Dr. Joyce he testified here, Miss Connor  
3 is a 47 year old woman with newly diagnosed  
4 squamous cell carcinoma. The death certificate,  
5 as you will recall, says lung cancer. That's  
6 the lung cancer. This is like proving the sky  
7 is blue, but we have to do it. So consider the  
8 source.

9 All right. Next. And I'm almost done.  
10 How many minutes do I have? Get the hook.

11 MR. MAXWELL: 6 minutes.

12 MR. WILNER: 6 minutes? Okay.

13 MR. MOTLEY: It's actually 3.

14 MR. WILNER: Okay. We are told that  
15 Reynolds published -- actually published what  
16 was suggested by Dr. Rodgman that they had hid,  
17 and that Rodgman's comment was only a short --  
18 we have Rodgman here? That Rodgman's comment  
19 was only a momentary lapse perhaps, but I'll  
20 show you that it's not just one place in the  
21 document that he says we've been -- we haven't  
22 published things because they concern cancer  
23 because later in the document, as soon as they  
24 find it, he says, I recommend we publish that  
25 back stuff because it's going to be bad if they

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1 find it in a lawsuit.

2 Now, if that is not incriminating we  
3 haven't found anything that is. That is  
4 incriminating because it's a scientist who has  
5 knowledge of -- that there has been a cover up  
6 and he's trying to tell the head guys, you know,  
7 let's do something before we get caught with our  
8 hands in the cookie jar.

9 Now, the fact -- I don't know what was  
10 published in '63, I'm not sure, but I'll tell  
11 you it wasn't half of what was indicated here  
12 that remained unpublished, because here it is.  
13 If a tobacco company has -- members of this  
14 research department have studied in detail  
15 cigarette smoke composition and these numbers  
16 relate to citations on the back of the paper --  
17 and you can see this when you look at it.

18 Some of these findings have been published  
19 and there are some published. We didn't say  
20 they never published. The problem is they only  
21 publish what they wanted to publish, which  
22 didn't concern cancer. And here they say, but  
23 much data remained unpublished and here is the  
24 key word, because they are concerned with  
25 carcinogenic or cocarcinogenic compounds and

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1 then all of those. And we've never seen those  
2 published at all.

3 Now, here on the next page he says or on  
4 the bottom of this page he says it's not my  
5 intent to suggest that this company accept the  
6 cigarette smoke health data at face value.  
7 Really? Why shouldn't the company accept it at  
8 face value? Good question.

9 This research scientist knows that the  
10 upper management of R.J. Reynolds doesn't accept  
11 things at face value when it comes to cancer and  
12 smoke. So he says, oh, it's not my intent to  
13 tell you to accept it, far be it from me, but I  
14 do suggest that this company through its  
15 research department actually participate in  
16 cigarette smoke studies, and then over on page  
17 15 -- this is the part here that we think is --  
18 tells it like it is, it's recommended that the  
19 data already available on physiologically active  
20 cigarette smoke components, e.g., polycyclic  
21 hydrocarbons and phenols be published. It's  
22 recommended that an analytical procedures  
23 concerning -- he's telling them not once, but  
24 twice, get serious. Now, why public --

25 MR. CRIST: Excuse me.

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1 MR. WILNER: Yes.

2 MR. CRIST: Can I have my pen back?

3 MR. WILNER: Yes. Thank you. Why  
4 publish? Well, the -- Reynolds also suggests,  
5 look, it doesn't matter if you publish or not,  
6 secrets are okay when it comes to cancer.

7 Mr. Motley will handle this in greater  
8 detail, but the answer is -- just in brief, and  
9 then I'll sit down. If the cigarette industry  
10 had from the 1950s adopted a truthful approach  
11 to the causation of disease by cigarettes, if it  
12 had said publicly that we accept what is obvious  
13 face value. We accept what has been called the  
14 overwhelming evidence by Rodgman again, and that  
15 contrary evidence was scant, we accept it. It  
16 would have deprived all those -- all those  
17 doubters, all those people who weren't sure of

18 any crush to stand on and the world would be  
19 different.

20 We have one more chance and maybe it's  
21 here. Thank you.

22 MR. MOTLEY: Anybody want to go home?  
23 Anybody not want to go home? You've been so  
24 patient it's kind of -- I feel like the last  
25 preacher at a revival, those who want to be

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1 saved have already marched up front and those  
2 who don't are ready to leave.

3 I would like to clarify one thing and,  
4 please, I've only got a few minutes and be  
5 patient with me. You've been so patient all day  
6 and -- but one thing is very important, this  
7 thing about why wasn't an autopsy done.

8 You've heard the testimony that doctors --  
9 about why they don't do autopsies when there is  
10 no reason to do one. Dr. Joyce -- we brought  
11 him in here because we felt like you wanted to  
12 hear from the people who treated her. And I  
13 just want to show you what he said about why  
14 more pathology wasn't done. This is from the  
15 transcript from yesterday.

16 Question: Did you feel any need to make  
17 any additional pathology studies based on the  
18 information that you received from Dr. Holland?

19 Answer: No, I did not.

20 Now, ladies and gentlemen -- and you can  
21 listen to the judge's charge, you won't here a  
22 word in here about we got some burden to a do an  
23 autopsy, okay, listen carefully, because you are  
24 not going to hear it.

25 Now, I asked my group rather than me stand  
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1 up here and telling you what I think the  
2 evidence shows, I put together a montage or a  
3 collection of clips from the trial to carry you  
4 back down memory lane, probably farther down  
5 that street than you want to go, but I hope that  
6 this will provide some insight into what we  
7 believe the evidence reasonably shows in this  
8 very important case.

9 This is about 7 and a half minutes long.  
10 It's all from the trial. It's all from the  
11 video that has been taken in here, and bear with  
12 us because they play an important part of what  
13 I'm going to say when we are done with this.  
14 Okay.

15 (Videotape playing.)

16 Question: Now, you talked about what was  
17 common knowledge, would you agree with me that  
18 it's obvious that if something is not released  
19 -- and I'm talking about before 1969, and  
20 before July 1st.

21 If something that Reynolds knows is not  
22 revealed to the public then that can't be part  
23 of the public's common knowledge, correct?

24 Answer: I don't know that I can -- I mean,  
25 I don't know that I could agree with that

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1       blanket. I mean, the public might have the same  
2       knowledge from other sources and it would, in  
3       fact, be part of common knowledge.

4           Question: All right. : When you joined  
5       R.J. Reynolds in 1977 with all these degrees and  
6       with four months working at Liggett Myers, you  
7       didn't know anything about tar and nicotine  
8       levels of cigarettes, did you?

9           Answer: When I joined RJR?

10          Question: Yes, sir.

11          Answer: No, I didn't.

12          Question: You didn't know what all of the  
13       chemicals were in cigarettes, did you?

14          Answer: No.

15          Question: You didn't know what all of the  
16       carcinogens were that were creating when  
17       cigarettes are burning?

18          Answer: No, I didn't.

19          Question: Was Winston with the filter  
20       safer than Camel without a filter?

21          Answer: I don't know.

22          Question: You don't know. Is Salem safer  
23       than Salem lights?

24          Answer: I don't know.

25          Question: Now, when you said this and  
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1       these were your words, not mine, page 3027, the  
2       Canada Expert Committee on Smoke Toxicity  
3       Reduction, product modification might reduce  
4       harm.

5           Now, when you said reduce harm, were you  
6       talking about to humans?

7           Answer: Specifically talking about harm  
8       reduction to smokers because cigarette smoking  
9       certainly is a risk factor for a number of  
10       diseases.

11          Question: No, sir. I'm not talking about  
12       a risk factor. You used the word harm.

13          Answer: And that's what I meant by the word  
14       harm.

15          Question: Do you concede that cigarette  
16       smoke harms people? Yes or no.

17          MR. CRIST: Object, Your Honor. It's  
18       beyond the scope of direct. This witness has  
19       not been qualified in that area.

20          THE COURT: Overruled.

21          Question: When you use the word harm, Dr.  
22       Townsend, do you concede that cigarette smoking  
23       has harmed at least one human being?

24          Answer: Mr. Motley --

25          MR. MOTLEY: Judge, can I have an  
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1       instruction for him to answer that question,  
2       please?

3           THE COURT: Answer the question that is put  
4       to you, sir,.

5          Answer: I don't know.

6          Question: And was there a feeling of -- a  
7       spirit of pride in what you were doing?

8          Answer: Very definitely. We were very

9 excited about what we were doing.

10 MR. CRIST: Your Honor, I object this goes  
11 beyond the scope of closing.

12 THE COURT: Stop the tape.

13 MR. MOTLEY: May I approach?

14 THE COURT: Approach.

15 (The following proceedings were held at  
16 side-bar out of the presence of the jury.)

17 MR. CRIST: Your Honor, there was not one  
18 word either in Mr. Motley's original closing or  
19 Mr. Wilner's original closing about knowledge of  
20 the biological research division, therefore --  
21 about the biological research division. The  
22 only subject about which this testified,  
23 therefore, I specifically did not deal with it  
24 in my closing argument and now what they are  
25 trying to do is try to end run me to bring up

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1 something that I didn't cover and, in fact, was  
2 precluded --

3 MR. MOTLEY: I said that he -- this company  
4 suppressed information. I said they did it on  
5 numerous occasions. I said there is ample proof  
6 in this record. He stood up and went on for 15  
7 minute about everything they published. They  
8 published this and they published that and they  
9 published the other. What they didn't publish  
10 was the "mouse house." He just said -- that was  
11 the last part of his argument, there was no  
12 suppression.

13 THE COURT: Did you not?

14 MR. CRIST: I absolutely did not address  
15 anything about the biological research division.

16 THE COURT: Not the "mouse house"  
17 specifically, but did you address the issue of  
18 dissemination of information?

19 MR. MOTLEY: Yes.

20 MR. CRIST: I only -- the Teague documents  
21 and the Rodgman documents.

22 THE COURT: I'll overrule. Go ahead.

23 (The following proceedings were held in  
24 open court in the presence of the jury.)

25 THE COURT: You may continue.

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1 (Videotape playing.)

2 Answer: We felt also by determining this  
3 mechanism we could then advise the company on  
4 the means of -- if cigarette smoking was the  
5 causation of possibly changing the product to  
6 remove the triggering mechanisms.

7 Answer: There is always trade-offs in  
8 cigarette design.

9 Question: You had conversations with R.J.  
10 Reynolds scientists who told you the slides  
11 showed what?

12 Answer: It showed a diffuse emphysema.

13 Question: Now, Doctor, did you believe  
14 that the findings and the work that you were  
15 engaged in in your part of the "mouse house" and  
16 what you saw and discussed with the veterinarian  
17 were important scientific findings?

18                   Answer: Very much so. We thought that we  
19                   made some pretty good advances.  
20                   Question: Were you interested in  
21                   continuing your research at the time you were  
22                   terminated?  
23                   Answer: Definitely.  
24                   Question: Sir, to your personal knowledge,  
25                   was the findings of emphysema that you were  
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1                   shown and the jury has seen two documents about  
2                   ever published by R.J. Reynolds?

3                   Answer: My work?  
4                   Question: Yes, sir.  
5                   Answer: No, sir.  
6                   Question: Well, taking this position, does  
7                   it cause illness? No one knows. Have you seen  
8                   those ads taken out by cigarette companies  
9                   denying or saying that nobody knows whether  
10                   cigarettes cause disease?

11                   Answer: I can tell you what materials I've  
12                   seen. I mean -- maybe restate the question.

13                   Question: In any of your research, did you  
14                   see anywhere where R.J. Reynolds put out a press  
15                   release or anybody quoted R.J. Reynolds as to  
16                   admitting that the amount of evidence  
17                   accumulated to indict cigarette smoke as a  
18                   health hazard is overwhelming?

19                   Answer: No, I did not.

20                   Question: Did you see from 1961 to July  
21                   1st, 1969, anywhere where R.J. Reynolds admitted  
22                   we are a drug company?

23                   Answer: No, I did not.

24                   Question: We are a member of the  
25                   pharmaceutical industry?

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1                   Answer: No.  
2                   Question: Nicotine is a drug; did you see  
3                   that by Reynolds?  
4                   Answer: No.  
5                   Question: You've not seen a single press  
6                   release in any newspaper article you've read  
7                   before July 1st, 1969, where R.J. Reynolds  
8                   revealed the additives they've placed in  
9                   cigarettes, have you?

10                   Answer: No.

11                   Question: Well, if there weren't enough  
12                   BaP in there to produce the results of cancer on  
13                   the back of those mice, what did do it?

14                   Answer: Well, there is 50 known  
15                   carcinogens in cigarette smoke and many of those  
16                   are in the particulate phase which is in --  
17                   present in tobacco smoke condensate. So there  
18                   is multiple carcinogens in the tobacco  
19                   condensate that accounted for the tumors in the  
20                   mice.

21                   Question: Is it the entire satanic group  
22                   that causes the cancer, Doctor?

23                   Answer: Yes, sir.

24                   Question: You are not a pulmonary  
25                   pathologist?

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1           Answer: I wouldn't say that I was, no,  
2           sir.

3           Question: Don't you have some file about  
4           cigarette related disease that you'd like to  
5           study before coming in here and giving opinions  
6           about it?

7           Answer: I don't really have a file on  
8           cigarette related disease. I have files on --  
9           certain papers and certain orders that deal with  
10          scientific issues.

11          Question: Well, how about the surgeon  
12          general's reports, reports of the surgeon  
13          general of the United States, have you a file on  
14          those?

15          Answer: No. Actually, I've never really  
16          read those reports.

17          Question: You've never read them?

18          Answer: No, I have not.

19          Question: Any of them?

20          Answer: I have never actually read the  
21          specific surgeon general's report.

22          Question: And what did you do with those  
23          comments? Did you send them to the cigarette  
24          industry who hired you?

25          Answer: No, I just told -- I told the  
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1           comments to the people that had visited me.

2          Question: These people were?

3          Answer: Attorneys representing cigarette or  
4          tobacco companies.

5          Question: So you didn't even write it  
6          down?

7          Answer: No.

8          Question: You just told them?

9          Answer: Yes.

10         Question: I would ask you, sir, if you can  
11         identify the signature of the person who signed  
12         the death certificate of Jean Connor?

13         Answer: Yes, that's my signature.

14         Question: That's your signature?

15         MR. MOTLEY: May the witness come down,  
16         Your Honor?

17         THE COURT: Yes.

18         Question: How certain are you, sir, that  
19         this woman died on this day from a primary lung  
20         cancer and its complications?

21         Answer: I'm 100 percent certain.

22         Question: You are 100 percent certain?

23         Answer: Yes.

24         MR. MOTLEY: I would like to address  
25         another subject at this time, and that is the  
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1           issue of polling and common knowledge, since  
2           that seems to be a focal point.

3           And I just want to review with you some of  
4           the evidence in the case from the plaintiff's  
5           perspective. These are documents Exhibit 64,  
6           and, Ladies and Gentlemen, some of these were  
7           admitted only for a special purpose, keep in  
8           mind that some of this was admitted for purposes

9 that the court instructed you at the time.  
10

11 Some smokers were emphatic in naming tar  
12 while denying nicotine as the villain, others  
13 were vocal naming nicotine and not tar. There  
14 was no clear cut answer, but most of the smokers  
15 felt you had to have nicotine to have  
16 satisfaction. There was a low awareness of tar  
17 an nicotine numbers and no comprehension of what  
18 they mean. Now, this is an internal document of  
19 Reynolds, 1972.

20 1967. Heavy smokers in younger groups of  
21 better educated are a lot less inclined to  
22 accept the surgeon general's report, although,  
23 the great majority are aware of it. Heavy  
24 smokers under 25 tend to share with nonsmokers a  
25 view that advertising causes people to smoke.

And then I don't have time to go through  
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1 all of these. Nonsmokers accept it better and  
2 you'll have these documents to look at.

3 Up please. Panzer this is the famous  
4 doubt. We've had a brilliant strategy for 18  
5 years, creating doubt for nearly 20 years.

6 Next page. The strategy was brilliantly  
7 conceived and executed. There has always been a  
8 holding strategy consisting of creating doubt  
9 about the health charge. And the Cigarette  
10 Controversy, especially those who are present  
11 and potential supporters, for example, heavy  
12 smokers must perceive, understand and believe in  
13 evidence to sustain their opinions that smoking  
14 may not be the causal factor. 1970 survey  
15 showed the majority believed that cigarettes are  
16 only one of many causes of cancer.

17 Up please. This document bears close  
18 scrutiny, folks, this is where they put out this  
19 booklet, sent out hundreds of thousands of it  
20 where they left out the "mouse house," and  
21 denied that cigarettes caused disease.

22 Okay. Next page, please. 1954 Gallup poll  
23 68 percent, 71 percent, one pack a day or more  
24 said they don't believe it. 1969. Mr. Crist  
25 asked you the question, who cares. Who cares if

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1 they had confessed? Who cared? Here is who  
2 cared. 69 percent of or 62 and a half percent  
3 of smoking women felt like before they would  
4 agree that smoking was harmful to health that  
5 the tobacco industry itself had to say that  
6 smoking was harmful.

7 Now, had they published that Rodgman memo  
8 where their chief scientist said the evidence  
9 was overwhelming those women would have gotten  
10 their answer. 34 percent 1970, this is one that  
11 is marked secret. 34 percent don't know smoking  
12 is hazardous to health. 41 percent think  
13 cigarette smoking in moderation is safe. 54  
14 percent says it's the tar. 46 percent don't  
15 know and I could go on and on and on and on.  
16

17 Ladies and gentlemen of the jury, you know,  
I don't read a whole lot of sophisticated stuff,

18 but sometimes you read some things in fairy  
19 tales and you learn a lot. Do you remember  
20 Humty Dumty? Anybody remember Humty Dumty?  
21 Nobody's favorite person is Humty Dumty?

22 He said a word means exactly what I say it  
23 means, nothing more and nothing less. Think  
24 about that when you go through this evidence.  
25 Reynolds would have you believe on one hand that

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1 everybody knew cigarettes caused, and that's a  
2 word. Think about the word Humty Dumty Reynolds  
3 and the word cause. Humty Dumty Reynolds and  
4 the word consumer acceptance. Humty Dumty  
5 Reynolds. Remember Humty Dumty when you think  
6 about R.J. Reynolds.

7 He told you that -- and I'm not going to  
8 say a whole lot about the Rodgman memo. Mr.  
9 Wilner did. But on page 13 of this document,  
10 this sums up the case for punitive damages.  
11 Now, this is their senior scientist. This is no  
12 road scientist you understand. This is no one  
13 in a laboratory, this is their principal  
14 scientist in the '60s. This is man that Dr.  
15 Townsend spoke so highly of. This is not a  
16 criminal case, folks, but we are asking you to  
17 impose a fine, so I would ask you to listen to  
18 these words carefully. This is the same man  
19 that said cigarette smoking should be indicted  
20 because the evidence is overwhelming.

21 If a company -- tobacco company plead not  
22 guilty or not proven to the charge that  
23 cigarette smoke or one of its constituents is a  
24 etiological -- to Humty Dumty that means cause  
25 -- factor in the causation of lung cancer or

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1 some other disease, can the company justifiably  
2 assume the position that publication of data  
3 pertaining to cigarettes smoke composition on  
4 physiological property should be withheld  
5 because such data might affect adversely the  
6 company's economic status when the company has  
7 already implied in its plea of not guilty that  
8 no such data, etiologic effect existed?

9 Now, folks, of all of the charts that they  
10 brought in here and everything that was said, if  
11 Reynolds had published these secret studies that  
12 they were talking about, if they proved that it  
13 caused cancer, don't you think they would have  
14 brought that in there and carried it around on a  
15 placard the size of that wall? You didn't see  
16 it. You can look through the documents and you  
17 won't see it. You won't see it.

18 I would like to say that Mr. Crist said  
19 that he didn't necessarily agree with everything  
20 I said, but I don't know whether he agrees with  
21 me about damages in this case.

22 MR. CRIST: Objection, Your Honor, beyond  
23 the scope.

24 THE COURT: Sustained.

25 MR. MOTLEY: When you have your verdict  
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1 form you will have discrete areas to fill out,  
 2 please, pay very, I know you will, close  
 3 attention and fill them out completely, please.

4 And I want to leave you with this. I want  
 5 to thank you and I want you to think about  
 6 this. When Humty Dumty Reynolds talks about  
 7 trade-offs. The trade here was they got \$2.7  
 8 billion and Jean Connor got cancer.

9 MR. CRIST: Your Honor, I object. Beyond  
 10 the scope.

11 MR. MOTLEY: It's not, Judge, he used the  
 12 word trade off himself.

13 THE COURT: You --

14 MR. CRIST: You just instructed him not do  
 15 to this, Your Honor.

16 MR. MOTLEY: I'm not going into damages.

17 THE COURT: The issue of punitive damages  
 18 was not discussed, if I recall.

19 MR. MOTLEY: It discussed suppression, Your  
 20 Honor.

21 THE COURT: All right. I'll overrule the  
 22 objection and allow it. Go ahead.

23 MR. MOTLEY: Thank you. I took the liberty  
 24 to show you what difference a warning would make  
 25 to a young woman in the '60s. We took one of

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1 the advertising things you've seen that's in  
 2 evidence and I created my own warning label and  
 3 this is only applicable up to July 1st, 1969.

4 I want you to think for a moment what this  
 5 commercial would have done to prevent 170,000  
 6 deaths a year from lung cancer if this would  
 7 have been shown on TV in the '60s. You can't  
 8 consider this past '69. She smoked a long time  
 9 before 1969. Just think about those thoughts.  
 10 Think what this kind of advertising would have  
 11 done for America's children and --

12 MR. CRIST: Your Honor, I object it's  
 13 referring to a matter which is not in evidence.

14 MR. MOTLEY: It is in evidence.

15 THE COURT: What you are about to show is  
 16 in evidence?

17 MR. MOTLEY: Yes, sir. The video is in  
 18 evidence and I have superimposed my own thoughts  
 19 about the type of warning label that should have  
 20 been on their products before July 1st, 1969.

21 MR. CRIST: Your Honor, I still object to  
 22 it. We have not had an opportunity to see it.

23 THE COURT: Would the jury go back into the  
 24 room?

25 (The following proceedings were held in  
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1 open court out of the presence of the jury.)

2 THE COURT: At the outset I asked everyone  
 3 -- that I fully was in favor of using  
 4 demonstrative devices and so forth and so on  
 5 provided that everyone was aware of it and it  
 6 was shown to everyone else.

7 MR. MOTLEY: Judge, we both assumed we were  
 8 going to be able to show evidence to the jury

9 and nobody --

10 THE COURT: Sir, you just told me that this  
11 is not just the evidence, it is evidence which  
12 now has something superimposed upon it.

13 MR. MOTLEY: Judge, I didn't take your  
14 evidence to superimpose something upon it.

15 THE COURT: It's not my evidence, sir.

16 MR. MOTLEY: I'm allowed to comment on the  
17 evidence. I did it in the form of a video.

18 THE COURT: All right. Let's look at it.

19 MR. MOTLEY: Okay. Same as he did.

20 MR. CRIST: Your Honor, let me just make my  
21 -- first of all, I have no idea what's on this  
22 videotape, but in addition to that, for them to  
23 come in and no evidence whatsoever for over four  
24 weeks with respect to the content of origin. I  
25 gave Mr. Motley or Mr. Wilner a lot of room when

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1 he put these things up here which we haven't  
2 seen before, but now they are coming in with  
3 something else. There is no testimony from any  
4 fact witness, no testimony from any expert  
5 witness as to the content of the warning which  
6 they are proposing to put up there.

7 THE COURT: Please show the video.

8 MR. MOTLEY: That's fine.

9 (Video playing.)

10 There's a wonderful world of softness, a  
11 wonderful world of freshness. It's the  
12 wonderful, wonderful, wonderful world of Salem  
13 cigarettes.

14 Salem softness freshens your taste.

15 THE COURT: Okay. I'm sustaining this  
16 objection. Mark this document for  
17 identification.

18 MR. MOTLEY: Might I ask why, Your Honor?

19 THE COURT: First of all, let me just say  
20 this, there was no objection initially to the  
21 entire video. It is the custom -- that entire  
22 video to me was a questionable type of  
23 utilization of something made up for use in  
24 argument, which is generally not permissible in  
25 this court anyway. The fact that you've taken a

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1 piece -- there is a difference between  
2 commenting on evidence --

3 MR. MOTLEY: He did the same thing, Judge.

4 THE COURT: Sir --

5 MR. MOTLEY: He did the same thing.

6 THE COURT: I don't think you are  
7 listening.

8 MR. MOTLEY: He showed a video of the trial  
9 itself.

10 THE COURT: I wasn't happy with that and  
11 you didn't object it.

12 MR. MOTLEY: I wasn't unhappy that he did  
13 it.

14 THE COURT: Well, sir, all I'm pointing out  
15 to you is my view and, I believe, that the law  
16 of this -- generally the law of this  
17 jurisdiction, that it's within my discretion, to

18 exclude a document, a video document, which was  
19 especially prepared for argument and was not in  
20 evidence at all.

21 Now, you could have shown that video if you  
22 wanted, I imagine, during the course of your  
23 argument and then made a comment on it, but you  
24 cannot fabricate something that is entirely new  
25 and present it to the jury at this time in front

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1 of -- without any warning whatsoever. I don't  
2 believe it's correct argument.

3 MR. MOTLEY: I didn't know we were required  
4 to give counsel warning of what we intended to  
5 do in --

6 THE COURT: I said you cannot fabricate by  
7 taking an exhibit and then modifying it or  
8 altering it in some way to create a relatively  
9 new piece of evidence and then present that to  
10 the jury for the first time in the last three  
11 minutes of argument, actually we're a minute  
12 over at this point, in fact, but by all means it  
13 may be marked for identification.

14 MR. MOTLEY: With all due respect, I was  
15 unaware of that, that you couldn't do that.

16 May I proceed verbally?

17 THE COURT: Yes, you may.

18 THE CLERK: Plaintiff's WWW.

19 THE COURT: WWW for Plaintiff?

20 MR. MOTLEY: I don't know.

21 (Plaintiff's Exhibit WWW was marked for  
22 identification.)

23 THE COURT: Recall the jury.

24 (The following proceedings were held in  
25 open court in the presence of the jury.)

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1 THE COURT: The objection is sustained.

2 MR. MOTLEY: I'd ask you to use your  
3 imagination, think about the -- form a verbal  
4 picture in your mind of the young girl on the  
5 swing in Salem country. Where she swings  
6 through the air, what if they had interrupted  
7 that swing and flashed up there, from the 1960  
8 document, warning 35,000 people have died from  
9 cigarette smoking and lung cancer, source R.J.  
10 Reynolds Research Department.

11 What if as they walked off arm in arm with  
12 a cigarette in her mouth and stopped the film,  
13 flashed up there senior scientist for R.J.  
14 Reynolds admits the evidence is overwhelming  
15 that cigarette smoking causes lung cancer.

16 This case is resting in your hands. Thank  
17 you. God bless you.

18 THE COURT: I want you to relax for a  
19 minute. I'm going to have a side-bar  
20 conference. Maybe one of the very last ones,  
21 very close to one of the last ones in the entire  
22 trial.

23 (The following proceedings were held at  
24 side-bar out of the presence of the jury.)

25 MR. WERBER: Mr. Maxwell is here.

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1 THE COURT: I just wanted to consult with  
 2 you as to where we go from here. I could --  
 3 it's going to take me 20 minutes to charge the  
 4 jury. They'll get started at 10 to 5. I was  
 5 thinking about keeping them down here to 6:30 or  
 6 7:00. I want to make sure that any of them  
 7 don't have any problems. I think we'll tell  
 8 them -- let them go no later than 7:00.

9 MR. MOTLEY: Judge, if they ask --

10 THE COURT: Well, I mean, if they don't  
 11 have -- I mean, if they have no problem with  
 12 that --

13 MR. MOTLEY: No, what I was going to say if  
 14 they have no problem with that at 7:00 if they  
 15 say, look, give us another hour we have a  
 16 verdict.

17 THE COURT: Oh, you bet you.

18 MR. MOTLEY: I don't want to lose them.

19 THE COURT: Oh, no, no, no. What I'm  
 20 saying is that -- one -- and I don't want to  
 21 have them think that we are going to keep them  
 22 down there until 11- or 12:00 or something like  
 23 that. I think I should give them an idea of  
 24 when they may be free. Any problem with that?

25 MR. CRIST: No, Your Honor.

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1 MR. JOHNSON: No, Your Honor.

2 THE COURT: I mean, I've got tickets to  
 3 Willie Nelson myself tonight.

4 MR. JOHNSON: Willie who?

5 MR. WERBER: Tex Williams.

6 THE COURT: All right. I'll go ahead and  
 7 get them started with that.

8 Everything was going so smoothly. This is  
 9 a subject of some discussion of which you were  
 10 doing, even the question of reading long  
 11 transcripts or excerpts of the transcripts of  
 12 the trial are not permitted in the federal  
 13 courts in the middle district of Florida and  
 14 there has been some discussion in this court  
 15 that this is a local -- a peculiarity. There  
 16 has been some leeway with it --

17 MR. MOTLEY: I just never.

18 THE COURT: -- in Duval County, but I  
 19 realize you may not have been aware of it.

20 MR. MOTLEY: I've never run into it  
 21 wherever I have been.

22 MR. CRIST: I have.

23 MR. WILNER: It really is true there are so  
 24 many unwritten rules about that kind of thing.

25 THE COURT: That is why it's always a good  
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1 thing to clear it all before that way -- and I  
 2 know you want to have --

3 MR. MOTLEY: They would have had three  
 4 hours of arguments if --

5 MR. CRIST: Judge, after you charge them,  
 6 can we leave --

7 THE COURT: No, if I have to stick around  
 8 you have to. You want to go out and eat at a

9 nice restaurant somewhere and I'll --  
10 MR. WILNER: I'll bring you back something.  
11 MR. CRIST: I want to go change clothes.  
12 THE COURT: Yes, of course, you may. And  
13 I'll --  
14 MR. MOTLEY: About time you put on a shirt  
15 different than the one you've worn for four  
16 weeks.  
17 MR. CRIST: Okay.  
18 THE COURT: The other thing I do so you'll  
19 be aware is that after the jury is -- after I  
20 finish charging the jury it's my custom to ask  
21 everyone to approach the bench for one last time  
22 and I will ask you the following question: Does  
23 anyone have -- other than as previously  
24 expressed in charge conference, does anyone have  
25 any objections to the instructions as read?

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1 I'll ask for that and the same for the verdict  
2 form.

3 MR. WILNER: Yes, Your Honor.

4 THE COURT: And then we don't have to meet  
5 here anymore at all.

6 MR. CRIST: Okay, Judge.

7 (The following proceedings were held in  
8 open court in the presence of the jury.)

9 THE COURT: Members of the jury, I shall  
10 now instruct you on the law that you must follow  
11 in reaching your verdict.

12 (Pager interruption.)

13 THE COURT: Let me start again. Members of  
14 the jury, I shall now instruct you on the law  
15 that you must follow in reaching your verdict.  
16 It is your duty as jurors to decide the issues  
17 and only those issues that I submit for  
18 determination by your verdict. In reaching your  
19 verdict, you should consider and weigh the  
20 evidence, decide the disputed issues of fact,  
21 and apply the law on which I shall instruct you  
22 to the facts as you find them from the  
23 evidence.

24 The evidence in this case consists of the  
25 sworn testimony of the witnesses, all exhibits

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1 received in evidence, and all facts that may be  
2 admitted or agreed to by the parties.

3 In determining the facts you may draw  
4 reasonable inferences from the evidence, you may  
5 make deductions and reach conclusions which  
6 reason and common sense lead you to draw from  
7 the facts shown by the evidence in this case.  
8 But you should not speculate on any matters  
9 outside the evidence.

10 In determining the believability of any  
11 witness and the weight to be given the testimony  
12 of any witness, you may properly consider the  
13 demeanor of the witness while testifying, the  
14 frankness or lack of frankness of the witness,  
15 the intelligence of the witness, any interest  
16 the witness may have in the outcome of the  
17 case. The means and opportunity the witness had

18 to know the facts about which the witness  
19 testified, the ability of the witness to  
20 remember the matters about which the witness  
21 testified and the reasonableness of the  
22 testimony of the witness considered in the light  
23 of all of the evidence in the case and in the  
24 light of your own experience and common sense.  
25

You have heard opinion testimony from  
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1 persons referred to as expert witnesses. You  
2 may accept such expert -- pardon me. You may  
3 accept such opinion testimony, reject it or give  
4 it the weight you think it deserves considering  
5 the knowledge, skill, experience, training or  
6 education of the witness, the reasons given by  
7 the witness for the opinion expressed and all  
8 other evidence in the case.

9 In your deliberations you are to consider  
10 several distinct claims, plaintiff Dana  
11 Raulerson as personal representative of the  
12 estate of Jean Connor alleges that defendant  
13 Reynolds was negligent in failing to warn Jean  
14 Connor prior to July 1, 1969, of the known or  
15 knowable dangers associated with smoking -- with  
16 smoking Defendant Reynolds' cigarettes and that  
17 such negligence was a legal cause of the injury  
18 and death of the decedent, Jean Connor.

19 Plaintiff Dana Raulerson also alleges that  
20 Defendant Reynolds was negligent in designing,  
21 manufacturing and selling a product that when  
22 used as intended was not reasonably safe for  
23 foreseeable users.

24 Plaintiff Dana Raulerson also alleges that  
25 the cigarettes which were manufactured and sold

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1 by Defendant Reynolds were in a defective  
2 condition, unreasonably dangerous to the user  
3 when they left the possession of Defendant  
4 Reynolds and that such defect was a legal cause  
5 of the injuries and death of the decedent Jean  
6 Connor.

7 Although, these claims have been tried  
8 together each is separate from the other and  
9 each party is entitled to have you separately  
10 consider each claim as it effects that party.  
11 Therefore, in your deliberations you should  
12 consider the evidence as it relates to each  
13 claim separately as you would had each claim  
14 been tried before you separately.

15 In considering the negligence claims of  
16 Plaintiff Dana Raulerson against Defendant  
17 Reynolds you must answer two separate  
18 questions. First, you must determine whether  
19 Defendant Reynolds was negligent by failing to  
20 warn Jean Connor prior to July 1, 1969, of the  
21 known or knowable dangers associated with  
22 smoking cigarettes manufactured by Defendant  
23 Reynolds.

24 Second, you must determine whether  
25 Defendant Reynolds was negligent in designing,

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1 manufacturing and selling a product that when  
 2 used as intended was not reasonably safe for  
 3 foreseeable users. If you decide that Defendant  
 4 Reynolds was negligent on one or both of these  
 5 claims you must then determine whether such  
 6 negligence was a legal cause of loss, injury or  
 7 damage sustained by Jean Connor's estate.

8 If the greater weight of the evidence does  
 9 not support the negligence claims of Plaintiff  
 10 Dana Raulerson against Defendant Reynolds, then  
 11 your verdict on those claims should be for  
 12 Defendant Reynolds.

13 The issues for your determination on the  
 14 claim of Dana Raulerson against Defendant  
 15 Reynolds on whether the cigarettes, I believe,  
 16 this pertains to the strict liability claim and  
 17 there was a word left out here.

18 Let me read this again. The issues for  
 19 your determination on the claim of Plaintiff  
 20 Dana Raulerson against Defendant Reynolds on  
 21 whether Defendant Reynolds' cigarettes, which  
 22 were manufactured and sold by Defendant Reynolds  
 23 were defective when they left the possession of  
 24 Defendant Reynolds and, if so, whether such  
 25 defect was a legal cause of the death of the

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1 decedent Jean Connor.

2 A product is defective if by reason of its  
 3 design the product is in a condition  
 4 unreasonably dangerous to the user of the  
 5 product and the product is expected to and does  
 6 reach the user without substantial change  
 7 effecting that condition.

8 A manufacturer has a duty to exercise  
 9 reasonable diligence in warning of reasonably  
 10 foreseeable dangers associated with the use of  
 11 its product. A manufacturer has a duty to warn  
 12 when the hazards associated with the product are  
 13 not obvious, reasonably apparent or not as well  
 14 known to the user as to the manufacturer.

15 A manufacturer, however, does not have a  
 16 duty to warn of risks associated with its  
 17 products when those risks are reasonably known  
 18 to the average consumer with a knowledge common  
 19 to the community. Therefore, you should  
 20 consider whether average consumers were aware of  
 21 the risks associated with smoking which  
 22 Plaintiff Dana Raulerson claims caused the  
 23 defendant Jean Connor -- decedent Jean Connor's  
 24 death.

25 A product is unreasonably dangerous because  
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1 of its design if the product fails to perform as  
 2 safely as an ordinary consumer would expect when  
 3 used as intended or in a manner reasonably  
 4 foreseeable by the manufacturer or the risk of  
 5 danger in design outweighs the benefits.

6 In determining whether the risk of danger  
 7 in the design outweighed the benefit of the  
 8 product you should consider the following

9 factors: One -- I see that some of you may be  
10 taking notes. It is not necessary to take  
11 notes. You will be given a copy of these  
12 instructions to take back with you. Let me just  
13 repeat it.

14 In determining whether the risk in the  
15 danger of design outweigh the benefit of the  
16 product you should consider the following  
17 factors: One, the usefulness and desirability  
18 of the products. Two, the availability of other  
19 and safer products who meet the same need.  
20 Three, the likelihood of injury and its probable  
21 seriousness. Four, the obviousness of the  
22 danger. Five, common knowledge and normal  
23 public expectation of danger. Six, avoidability  
24 of injury by care and use of the product  
25 including the effect of instructions or

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1 warnings. And Seven, the ability to eliminate  
2 the danger without seriously impairing the  
3 usefulness of the product or making it unruly  
4 expensive.

5 If the greater weight of the evidence does  
6 not support the claim of Plaintiff Dana  
7 Raulerson that Defendant Reynolds cigarettes  
8 were defective and unreasonably dangerous, then  
9 your verdict should be for the Defendant  
10 Reynolds.

11 In considering Plaintiff Dana Raulerson's  
12 failure to warn claims, you are instructed that  
13 since July 1, 1969, federal law has required  
14 that cigarette packages contain certain  
15 warnings. There is no dispute in this case that  
16 Defendant Reynolds cigarettes were labeled in  
17 accordance with this law.

18 Accordingly, I instruct you as a matter of  
19 law that Defendant Reynolds has provided legally  
20 sufficient warnings since July 1, 1969,  
21 concerning any relationship between smoking and  
22 health and you are not to consider any failure  
23 to warn claim or claims that the federally  
24 mandated warnings were inadequate after July 1,  
25 1969.

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1 The issue for your determination regarding  
2 Defendant Reynolds statute of limitations  
3 defense is whether decedent Jean Connor filed  
4 her action within the time the facts giving rise  
5 to her cause of action were discovered or should  
6 have been discovered by the decedent Jean Connor  
7 with the exercise of due diligence.

8 In determining this issue you should  
9 consider whether the decedent Jean Connor both  
10 knew or reasonably should have known of her  
11 claimed injury and that Defendant Reynolds'  
12 product was the likely cause of her injury prior  
13 to March 29, 1991.

14 On the Defendant Reynolds' state of the art  
15 defense you must determine whether the alleged  
16 injuries suffered by Jean Connor as a result of  
17 the challenged design would have been avoided or

18 less severe had Defendant Reynolds used a  
19 feasible and available alternative design.  
20

21 In making this determination you are  
22 instructed that Defendant Reynolds is held  
23 accountable to the level of scientific and  
24 technical knowledge existing at the time that it  
25 designed the cigarettes smoked by Jean Connor.  
In this regard a manufacturer has the duty to

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1 posess expert knowledge in the field of its  
2 products.

3 If the greater weight of the evidence does  
4 not support either of the defenses of the  
5 Defendant Reynolds and the greater weight of the  
6 evidence does support either of the claims of  
7 Plaintiff Dana Raulerson, then your verdict  
8 should be for Plaintiff Dana Raulerson and the  
9 total amount of her damages.

10 Greater weight of the evidence means the  
11 more persuasive and convincing force and effect  
12 of the entire evidence in the case.

13 Negligence is the failure to use reasonable  
14 care. Reasonable care is that degree of care  
15 which a reasonably careful person would use  
16 under like circumstances.

17 Negligence may consist either in doing  
18 something that a reasonably careful person would  
19 not do under like circumstances or in failing  
20 to do something that a reasonably careful person  
21 would do under like circumstances.

22 Negligence is a legal cause of injury if it  
23 directly and in a natural and continuance  
24 sequence produces or contributes substantially  
25 to producing such injury so that it can

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1 reasonably be said that but for the negligence  
2 the injury would not have occurred.

3 In order to be regarded as a legal cause of  
4 loss, injury or damage negligence need not be  
5 the only cause. Negligence may be a legal cause  
6 of loss, injury or damage even though it  
7 operates in combination with the act of another  
8 or some other cause. If such other causes occur  
9 at the same time as the negligence, and if the  
10 negligence contributes substantially to  
11 producing such loss, injury or damage.

12 Similarly a defect in a product is a legal  
13 cause of injury if it directly in a natural and  
14 continuous sequence produces or contributes  
15 substantially to producing such injury so that  
16 it can reasonably be said that but for the  
17 defect the injury or damage would not have  
18 occurred.

19 In order to be regarded as a legal cause of  
20 loss, injury or damage the defect need not be  
21 the only cause. A defect may be a legal cause  
22 of loss, injury or damage even though it  
23 operates in combination with the act of another  
24 or some other cause if such other cause occurs  
25 at the same time the defect has its effect and

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1 that the defect contributes substantially to  
 2 producing such loss, injury or damage.

3 If your verdict is for the Defendant  
 4 Reynolds you will not consider the matter of  
 5 damages, but if you find for the Plaintiff Dana  
 6 Raulerson you should award an amount of money  
 7 that the greater weight of the evidence shows  
 8 will fairly and adequately compensate decedent  
 9 Jean Connor's estate and her survivors for such  
 10 damage, loss or injury which they sustained as a  
 11 result of the action of the Defendant Reynolds  
 12 including any such damages as the estate and the  
 13 survivors are reasonably certain to experience  
 14 in the future.

15 In determining any damages recoverable on  
 16 behalf of the decedent Jean Connor's estate you  
 17 should consider the following elements:

18 One, the loss of net accumulation. Net  
 19 accumulation is the part of the decedent Jean  
 20 Connor's net income from salary or business  
 21 after taxes including pension benefits, but  
 22 excluding income from investments continuing  
 23 beyond death which the decedent Jean Connor  
 24 after paying her personal expenses and monies to  
 25 the support of her survivors would have left --

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1 would have left as part of her estate if she had  
 2 lived her normal life expectancy.

3 Two, medical or funeral expenses due to the  
 4 decedent Jean Connor's -- due to the decedent  
 5 Jean Connor's injury or death which had been  
 6 paid or became a charge against Jean Connor's  
 7 estate.

8 In determining any damages to be awarded  
 9 the decedent Jean Connor's personal  
 10 representative -- for the benefit of decedent  
 11 Jean Connor's surviving children you shall  
 12 consider certain elements of damage for which  
 13 there is no exact standard for affixing the  
 14 compensation to be awarded.

15 Any such award should be fair and just in  
 16 the light of the evidence regarding the  
 17 following elements. The loss by Valerie Dizor,  
 18 Joseph Marion, Jr., or Matthew Marion of  
 19 parental companionship, instruction and guidance  
 20 and their mental pain and suffering as a result  
 21 of the decedent Jean Connor's injury and death.

22 In determining how long the decedent Jean  
 23 Connor would have lived, had she lived out her  
 24 normal life, you may consider her life  
 25 expectancy at the time of her death. The

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1 mortality tables received in evidence may be  
 2 considered in determining how long the decedent  
 3 Jean Connor may have been expected to live.  
 4 Such tables are not binding on you, but may be  
 5 considered together with other evidence in the  
 6 case bearing on her health, age and physical  
 7 condition before her injury and death in  
 8 determining the probable length of her life.

9 Any amount of damages which you allow for  
10 of net accumulation should be reduced to its  
11 present money value and both the amount of such  
12 loss net accumulation and their present money  
13 value should be stated in your verdict. The  
14 present money value of future economic damages  
15 is the sum of money needed now which together  
16 with what that sum will earn in the future --  
17 will compensate Plaintiff Dana Raulerson for  
18 those losses as they are actually experienced in  
19 the future years.

20 If you find for Plaintiff Dana Raulerson  
21 and against Defendant Reynolds you should  
22 consider whether in addition to compensatory  
23 damages, punitive damages are warranted in the  
24 circumstances of this case as punishment and as  
25 a deterrent to others.

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1 Punitive damages are warranted if you find  
2 that, one, the conduct causing damage to Jean  
3 Connor was so gross and flagrant as to show a  
4 reckless disregard of human life or the safety  
5 of persons exposed to the effects of such  
6 conduct, or, two, the conduct showed such an  
7 entire lack of care that the Defendant Reynolds  
8 must have been consciously indifferent to the  
9 consequences, or, three, that the conduct showed  
10 such an entire lack of care that the Defendant  
11 Reynolds must have wantonly or recklessly  
12 disregarded the the safety and welfare of the  
13 public or, four, the conduct showed such  
14 reckless indifference to the rights of others as  
15 to the equivalent of the intentional violation  
16 of those rights.

17 In determining the amount of punitive  
18 damages, if any, to be assessed and as  
19 punishment and as a deterrent to others you  
20 should consider the following: One, the nature,  
21 extent and degree of misconduct and the related  
22 circumstances. Two, the Defendant Reynolds'  
23 financial resources.

24 Any punitive damages you assess would be in  
25 addition to any compensatory damages you award.

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1 You may in your discretion decline to assess  
2 punitive damages.

3 The fact that R.J. Reynolds Tobacco Company  
4 is a corporation must not prejudice you in your  
5 deliberations or in your verdict. You may not  
6 discriminate between corporation and natural  
7 individuals, both are persons in the eyes of the  
8 law and both are entitled to the same fair and  
9 impartial consideration by the same legal  
10 standard.

11 Your verdict must be based on the evidence  
12 that has been received and on the law on which I  
13 have instructed you.

14 In reaching your verdict you are not to be  
15 swayed from the performance of your duty by  
16 prejudice, sympathy or any other sentiment for  
17 or against any party.

18           When you retire to the jury room you should  
19           select one of your number to act as foreman or  
20           forewoman to preside over your deliberations and  
21           sign your verdict. Your verdict must be  
22           unanimous, that is, your verdict must be agreed  
23           to by each of you. You will be given a form of  
24           verdict which I shall now read to you and I'm  
25           going to ask the bailiff to distribute to you

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1           each a copy of the verdict form for you to  
2           follow as I go through it.

3           Now, remember this is going to be a  
4           unanimous verdict so I'm going to collect those  
5           verdict forms so we don't have six different  
6           verdicts coming back.

7           At the top is what we call the style of the  
8           case, and it shows the court and the names of  
9           the parties.

10           Verdict.

11           We the jury return the following verdict:  
12           And there follows then a number of questions and  
13           places for you to provide answers to be filled  
14           in and finally a date and a signature line.

15           One, was there negligence on the part of  
16           Defendant R.J. Reynolds Tobacco Company which is  
17           a legal -- which was a legal cause of the death  
18           of decedent Jean Connor? And you'll see there  
19           is a place for you to check either yes or no.

20           Two, were the cigarettes manufactured by  
21           Defendant R.J. Reynolds Tobacco Company  
22           unreasonably dangerous and defective in the  
23           legal cause of the death of decedent Jean  
24           Connor? Again, there is a place for you to  
25           check yes or no.

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1           If your answers to questions one and two  
2           are both no then your verdict is for the  
3           Defendant R.J. Reynolds Tobacco Company and you  
4           should proceed no further except to sign and  
5           return your verdict. If your answer is yes to  
6           either question one or two, please answer all  
7           the remaining questions on this verdict form.

8           Three, did the decedent Jean Connor know or  
9           should she have reasonably known of her claimed  
10           injuries on or before March 29th, 1991? Again,  
11           there is a place for you to mark yes or no.

12           If your answer to question three is yes  
13           your verdict is for Defendant R.J. Reynolds  
14           Tobacco Company, however, please answer all of  
15           the remaining questions on the verdict form.

16           Four, what is the amount of any net  
17           accumulations lost by the estate of Jean  
18           Connor? And there is a line with a dollar sign  
19           for you to fill in a figure or such a figure as  
20           you determine is appropriate.

21           Five, what is the present value of such  
22           loss net accumulation? Again, a dollar sign and  
23           a blank to fill in whatever you choose there.

24           Six, what is the amount of any medical or  
25           funeral expenses resulting from the injury and

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1 death of decedent Jean Connor paid by or charged  
 2 to the estates of Jean Connor? Again, a dollar  
 3 sign and a blank.

4 Seven, what is the amount of any damages  
 5 sustained by Valerie Dizor in the loss of  
 6 parental companionship, instruction and guidance  
 7 and in Valerie Dizor's pain and suffering as a  
 8 result of the decedent's injury and death?

9 There are two blanks there and the first is in  
 10 the past and there is a dollar sign and a blank,  
 11 and the second is in the future, again, with a  
 12 dollar sign and a blank.

13 Eight, what is the amount of any damages  
 14 sustained by Joseph Marion, Jr., in the loss of  
 15 parental companionship, instruction and in  
 16 Joseph Marion, Jr's pain and suffering which  
 17 resulted from decedent's injury and death?

18 Again, there are two lines for you to fill  
 19 in. Such as you wish as there were with regard  
 20 to the previous question.

21 Nine, what is the amount of any damages  
 22 sustained by Mathew Marion in the loss of  
 23 parental companionship, instruction and guidance  
 24 and in Mathew Marion's pain and suffering as a  
 25 result of the decedent's injury and death?

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1 Again, two lines as you previously saw for the  
 2 others.

3 Ten, under the circumstances of this case  
 4 state whether punitive damages are warranted  
 5 against Defendant R.J. Reynolds Tobacco  
 6 Company. And then there is a place for you to  
 7 indicate yes or no.

8 Eleven, what is the total amount of  
 9 punitive damages, if any, if you find should be  
 10 assessed against Defendant R.J. Reynold Tobacco  
 11 Company, again a dollar sign and a blank.

12 If you elect not to assess punitive damages  
 13 against Defendant R.J. Reynolds you should enter  
 14 zero as the amount of damages there. Then it  
 15 says so say we all this blank day of April --  
 16 pardon me May, 1997. Time flies when we are  
 17 having fun.

18 When you have agreed on your verdict the  
 19 foreman or forewoman acting for the jury should  
 20 date and sign the appropriate form of verdict.

21 Members of the jury, if you'll wait just  
 22 one moment. Counsel approach.

23 (The following proceedings were held at  
 24 side-bar out of the presence of the jury.)

25 THE COURT: Other than as previously  
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1 stated, are there any objections on behalf of  
 2 plaintiff to the instructions as I read them to  
 3 the jury?

4 MR. MAXWELL: No, Your Honor.

5 THE COURT: Defendant?

6 MR. JOHNSON: No, Your Honor.

7 THE COURT: Are there any objections as to  
 8 the form of verdict as I read to the jury and as

9 will be delivered to them?  
10 MR. MAXWELL: No, Your Honor.  
11 MR. JOHNSON: No, Your Honor.  
12 THE COURT: Very well.  
13 (The following proceedings were held in  
14 open court in the presence of the jury.)  
15 THE COURT: In a few minutes I'm going to  
16 ask you to commence your deliberations after we  
17 have all of the evidence that is going to go  
18 back with you. In addition to those items of  
19 evidence you will receive the original verdict  
20 form and a copy of the instructions, a written  
21 copy of the instructions as I read them to you,  
22 so we can just --  
23 How much time do you think you need?  
24 THE CLERK: As soon as I can get them  
25 together.

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1 THE COURT: What we are going to do is  
2 declare a brief recess until he is ready and  
3 then -- you are not to deliberate yet until I  
4 send you back with all of the evidence in the  
5 room. We'll be in recess until whatever it  
6 takes.

7 (Short recess.)

8 THE COURT: All right. Members of the  
9 jury, at this time, I'm going to allow you to  
10 retire to start to consider your verdict. The  
11 clerk will bring back, as you go back, all of  
12 the exhibits that have been received in evidence  
13 as well as the verdict form and copies of the  
14 instructions.

15 Do you have copies of the jury  
16 instructions?

17 BAILIFF: Your Honor, I have it right  
18 there.

19 THE COURT: They are to get those as well.  
20 One copy for each of you.

21 MR. CRIST: Your Honor, can I -- has the  
22 court clarified how long they will be  
23 deliberating, Your Honor?

24 THE COURT: Yes, I already discussed it.  
25 We had an intimate conversation while you were

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1 gone and I anticipate that -- we anticipate  
2 they'll stay down here until approximately 7:00  
3 until -- unless they feel they're very close.  
4 Other than that it will be around 7:00 then and  
5 they made their phone calls.

6 Any questions with regard to that?

7 MR. MAXWELL: None from plaintiff.

8 THE COURT: Anybody want to have a side-bar  
9 conference? No request, then you may retire and  
10 consider your verdict. All right. Court will  
11 be in recess.

12

13

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P R O C E E D I N G S

2

May 2, 1997

7:03 p.m.

3

- - -

4

(The following proceedings were reported by  
Terrie Cook.)

5

(The following proceedings were held out of  
the presence of the jury:)

6

THE COURT: Does anyone want to request the  
Blockbuster charge yet? Recall the jury.

7

MR. CHRIST: Your Honor, before we do that,  
I would just like to welcome back to court  
Ms. Grant, who has come to visit this evening.  
I hope everything is well.

8

MS. GRANT: She passed away.

9

THE COURT: Oh, I'm sorry to hear it.

10

Recall the jury.

11

(The following proceedings were held in  
open court in the presence of the jury:)

12

THE COURT: Okay. Be seated. You recall  
that when I sent you out, I said we'd keep you  
until about 7:00 o'clock unless you felt that  
you were so close to -- to the decision on this  
thing you wanted to stay later. So I will --  
you know, without asking what or anything like  
that, do you want to go home now or do you want

13

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1

to stay?

2

THE JURORS: Go home.

3

THE COURT: Go home. Okay.

4

A JUROR: Sorry.

5

THE COURT: That's okay. I would remind  
you, yet again, I know your deliberations have  
begun, but you're to delib- -- you are to  
deliberate only here and in the presence of each  
other. So when you go home, the same rules  
apply that have in the past, namely, that you're  
not to discuss the case with anyone or even get  
a conference call going with the six of you.  
All deliberations will have to be here in the  
courtroom.

6

And all the same admonitions which I've  
previously given you, therefore, will still  
apply. Does anyone want to be refreshed as to  
those? Don't talk to anyone, don't watch  
anything about the case on TV or what have you.  
There's a possibility there may be stuff on TV  
about you, I don't know, but avoid it to the  
extent that you can.

7

Everyone have a pleasant weekend. Come  
back at 9:00 o'clock here. I found out that  
this courtroom will be down next week, so you

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1 will be able to continue -- I take it you've  
2 gotten some use to --

3 A JUROR: Home sweet home.

4 THE COURT: -- you're relatively  
5 comfortable there. I mean, there's a place I  
6 could move you that's a little bit bigger and  
7 nicer, but I think you'd just as soon stay where  
8 you are.

9 I will look forward to seeing you next  
10 week. Actually, unless anyone requests it  
11 specifically, I don't think we need to convene  
12 court for you to resume your deliberations.  
13 Does anyone want me to for any reason?

14 MR. WILNER: It's not -- the formality  
15 would not be necessary for the plaintiffs, Your  
16 Honor.

17 MR. CRIST: Your Honor, we're certainly  
18 agreeable to that as well.

19 THE COURT: Yes.

20 THE BAILIFF: If I may ask one question.

21 THE COURT: Yes.

22 THE BAILIFF: In the last tobacco trial I  
23 had we had the jurors coming in at different  
24 times, you know, arrive at different times and I  
25 had them all wait out here until they all were

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1 here.

2 THE COURT: Good.

3 THE BAILIFF: And I'd like to know if  
4 that's procedure, you'd like me to do that.

5 THE COURT: That'd be fine.

6 THE CLERK: May I remind you of something?  
7 Monday we have about 300 prospective jurors  
8 coming in and you have parking -- you've got the  
9 parking? You've got places for them?

10 THE BAILIFF: I've already taken care of  
11 it.

12 THE COURT: All jurors who have been here a  
13 month get preference.

14 A JUROR: Five weeks Monday.

15 THE COURT: Someone have tickets? You have  
16 tickets.

17 THE BAILIFF: I've gotten them and I've  
18 passed them --

19 THE COURT: No, no, someone had tickets?

20 A JUROR: That's for tomorrow.

21 A JUROR: Oh, me, yeah.

22 THE COURT: Okay. Well, enjoy the show.  
23 I'm going to see Willie Nelson right now as a  
24 matter of fact. Casuals, you know.

25 Okay. Have a pleasant weekend, everyone.

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1 We'll be in recess until further word from the  
2 jury. Y'all resume -- be here at 9:00 o'clock.

3 A JUROR: How is Mr. Raulerson?

4 THE COURT: The word on Mr. Raulerson,  
5 everyone, is that he is in the hospital and has  
6 been diagnosed --

7 THE CLERK: He's home now, Your Honor.

8 THE COURT: He's home?

9                   THE CLERK:  Yep.  
10                  THE COURT:  I thought it was pneumonia.  
11                  THE CLERK:  It is, but they shot him full  
12                  of antibiotics.  
13                  THE COURT:  Okay.  You see an old friend is  
14                  out there.  
15                  THE BAILIFF:  Ms. Grant.  
16                  THE COURT:  Ms. Grant is out there  
17                  visiting, but you can't talk to her until  
18                  later.  Very well.  Y'all have a good weekend.  
19                  (The proceedings were adjourned at 7:10  
20                  p.m.)  
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